NO. 79690-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

MICHAEL DEREK SETTERSTROM,

Petitioner.

COURT OF APPEALS NO. 33846-7-II

ON APPEAL FROM THE
SUPERIOR COURT OF THURSTON COUNTY
CAUSE NO. 05-1-00518-5

Before The Honorable Wm. Thomas McPhee, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUPPLEMENTAL ARGUMENT

1. THE PAT-DOWN SEARCH WAS UNLAWFUL BECAUSE THE OFFICER DID NOT HAVE A REASONABLE BASIS TO BELIEVE THAT SETTERSTROM WAS ARMED OR PRESENTLY DANGEROUS.

Police received a call regarding two "unwanted subjects" in the lobby of a Department of Social and Health Services building in Tumwater, Washington at approximately 8 a.m. on February 28, 2005. Suppression Report of Proceedings [RP] at 9. Lieutenant Don Stevens, who responded to the call, testified that one person in the DSHS lobby "appeared to be what I call on the nod or on a crash from methamphetamine[.]" The second person, Michael Setterstrom, was sitting on a bench in the lobby, filling out a form for DSHS support. Suppression RP at 10. Stevens talked with Setterstrom while he was filling out the form. Suppression RP at 10. Stevens asked Setterstrom for his name, and he responded that his name was Setterstrom. That name matched the name that Stevens saw on the DSHS form. Suppression RP at 10. Stevens asked Setterstrom how to spell his name, and Setterstrom then said that his name was not Setterstrom, but that it was Victor Garcia and that he was filling out the form for a friend. Suppression RP at 10-11. The other man had awakened by that time and Stevens asked him

who Setterstrom was. Suppression RP at 11. Setterstrom stated "Victor" before the second man could respond. Suppression RP at 11. Stevens observed that Setterstrom was "fidgeting around" and was "nervous[.]" Suppression RP at 11-12. He stated that this "sets off my —I guess I would say my other senses" and that he believed he needed to determine what was "going on here and keep myself safe." Suppression RP at 12. He stated that "these people that are involved in methamphetamine, to me, will become violent at any moment." Suppression RP at 12. A second officer escorted the other man out of the building. Suppression RP at 11. Stevens then performed a pat-down search of Setterstrom and felt "hard objects" in his right front pants pocket. Suppression RP at 12. He could not tell what the objects were. He removed the objects at once, and as he did that he also removed a "one-by-one baggie" containing what Stevens believed to be methamphetamine. Suppression RP at 12. Stevens ordered Setterstrom to put his hands behind his back so that he could place him under arrest. As Stevens was attempting to put handcuffs on Setterstrom, he dropped to his knees, took the Ziploc bag into his mouth, and swallowed it. Suppression RP at 13-14. Police did not recover the baggie from Setterstrom. Suppression RP at 14.

Setterstrom's Criminal Rule 3.6 motion to suppress was denied

following a hearing on August 22, 2005, and Findings of Fact and Conclusions of Law were subsequently entered. CP at 85-86. Setterstrom was later convicted of possession of a controlled substance. CP at 66-73. The conviction was affirmed by a Court Commissioner in Division 2 of the Court of Appeals, and Setterstrom's motion to modify the ruling was denied. This Court granted review.

Because Stevens did not have a reasonable basis to believe that Setterstrom was presently armed or dangerous, and because the scope of the pat-down search exceeded that which was necessary to determine whether Setterstrom presented a danger to Stevens, Setterstrom's rights under the Fourth Amendment[1] and Wash. Const. art. I, § 7 were violated. The trial court erred in denying Setterstrom's motion to suppress the fruits of the search and subsequent arrest, and the Court Commissioner of the Court of Appeals erred in affirming that denial. This Court should reverse Setterstrom's conviction and order suppression of all evidence discovered as a result of the unlawful search.

Article I, § 7 protects against warrantless searches of a citizen's private affairs. A warrantless search is *per se* unreasonable under both

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[1]The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing

Article I, § 7 and the Fourth Amendment unless it falls within one of Washington's "jealously and carefully drawn exceptions" to the warrant requirement. *State v. Hendrickson*, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)). The State has the burden to rebut this presumption by establishing one of the exceptions to the warrant requirement. *State v. Kinzy*, 141 Wn.2d 373, 384, 5 P.3d 668 (2000).

One exception to the warrant requirement allows police to briefly detain a person on reasonable suspicion that the person may be involved in criminal activity to investigate the suspicious behavior. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). See also *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986); *State v. White*, 135 Wn.2d 761, 769 n. 8, 958 P.2d 982 (1998) (containing a list of exceptions to the warrant requirement recognized in Washington). Police must be able to point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant intrusion. *Terry*, 392 U.S. at 21; *State v. Mendez*, 137 Wn.2d 208, 223, 958 P.2d 982 (1998).

Terry permits an officer to conduct a limited search for weapons if the officer has reasonable grounds to believe that the person is armed and

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placed, and the persons or things to be seized.

presently dangerous. *Terry*, 392 U.S. at 29; *State v. Hobart*, 94 Wn.2d 437, 441, 617 P.2d 429 (1980); *State v. Broadnax*, 98 Wn.2d 289, 294, 654 P.2d 96 (1982) (citing *Sibron v. New York*, 392 U.S. 40, 64, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968)). The limited purpose of this search is not to discover evidence of a crime, but to allow the officer to pursue his or her investigation without fear. *Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972).

The central inquiry regarding investigative stops is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry*, 392 U.S. at 19.

This Court has held that it is settled that Article I, § 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution, and therefore an analysis under *Gunwall*[2] is not required in this case. *State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004).

Like warrantless seizures, warrantless searches are *per se* unreasonable, and the State bears the burden of establishing that constitutional requirements are met. *State v. Collins*, 121 Wn.2d 168, 172, 847 P.2d 919 (1993). A warrantless search passes constitutional muster only

[2]*State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

if (1) the initial detention is legitimate; (2) a reasonable safety concern justifies a protective frisk for weapons; and (3) the scope of the frisk is limited to the protective purpose. *Id.* at 173. See also, *Adams v. Williams*, 407 U.S. at 146.

Before an officer may place a hand on a citizen in order to search his or her person, the officer must have constitutionally adequate grounds to conduct a search. *Hobart*, 94 Wn.2d at 441 (citing *Sibron v. New York*, *supra*). A reasonable safety concern to an officer exists, and a protective frisk for weapons is justified, when an officer can point to "specific and articulable facts" that create an objectively reasonable belief that a suspect is "armed and presently dangerous." *Terry*, 392 U.S. at 21-24. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27.

An officer's safety concerns justify a protective pat down search only if those concerns are founded "on facts specific to the individual suspect," and not a "generalized suspicion." *State v. Lennon*, 94 Wn. App. 573, 580, 976 P.2d 121 (1999); *State v. Smith*, 102 Wn.2d. 449, 688 P.2d 146 (1984). In *Smith*, police officers frisked the defendant after stopping him for

questioning. The officers had no reason to believe that Smith, in particular, was armed and dangerous. Instead, they routinely frisked everyone they encountered in that area of Seattle. This Court held that this type of generalized suspicion is not sufficient to justify a warrantless search. *Smith*, 102 Wn.2d at 452-53.

In this case, Steven's encounter with Setterstrom began as an investigative stop. The pat-down search for weapons was unreasonable because Stevens did not have probable cause to believe that Setterstrom was armed or presently dangerous. Stevens testified regarding his previous experience in dealing with persons suspected of being on drugs, but offered no concrete evidence the Setterstrom was under the influence of drugs. Stevens' suspicion that Setterstrom was high on methamphetamine was based on mere surmise, "instinct" or an "inarticulate hunch,"[3] which cannot form the basis of a reasonable suspicion. *Terry*, 392 U.S. at 21-22; *State v. Thompson*, 93 Wn.2d 838, 842-43, 613 P.2d 525 (1980). Stevens knew absolutely nothing about Setterstrom or his purpose for being in the lobby of the building. He did not ascertain whether Setterstrom had legitimate business at DSHS, although facts indicate that Setterstrom was filling out a form for DSHS benefits and that he therefore was in the building for a lawful

[3] Or, as Stevens' phrased it, based on his percept that Setterstrom was "nervous" and

purpose. Suppression RP at 10.

When he confronted Setterstrom, Stevens testified that Setterstrom appeared "nervous," was fidgeting, and was "not focused." Suppression RP at 10. Setterstrom initially gave his correct name, then gave a different name. Setterstrom's name was visible to Stevens on the form that he was filling out. Suppression RP at 11.

Stevens had no objective facts on which to base a belief that Setterstrom presented a danger, therefore justifying the pat-down search. The only information that Stevens had was that there were two people in the lobby of the building early in the morning who were "unwanted[,]" that one was asleep, and "one appeared to be . . . high on drugs." Suppression RP at 9. When he arrived, Setterstrom was seated in the lobby, filling out a DSHS form. Suppression RP at 10. Stevens said that Setterstrom was "fidgeting" and was "up and down in his activities." Suppression RP at 10, 17. Stevens said that he believed that Setterstrom was high on methamphetamines. Suppression RP at 11. Setterstrom's behavior, however, does not in itself rise to the level of a reasonable belief that he was dangerous or armed. *Cf. State v. Walker*, 66 Wn. App. 622, 629, 834 P.2d 41 (1992) (initial detention unreasonable where defendant—who matched general description of

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"fidgety," "it sets off my—I guess I would say my other senses." Suppression RP at 12.

suspect—attempted to avoid police and appeared nervous); See also, *State v. Henry*, 80 Wn. App. 544, 552, 910 P.2d 1290 (1995) ("most persons stopped by law enforcement officers display some signs of nervousness" and nervousness insufficient to support reasonable suspicion) (quoting *State v. Barwick*, 66 Wn. App. 706, 710, 833 P.2d 421 (1992)).

Moreover, Stevens had no concrete basis to believe that Setterstrom was high on methamphetamine. Nevertheless, he testified:

> [t]hese people that are involved in methamphetamine, to me, will become violent at any moment. They are uncontrollable. So I decided to pat him down for weapons to make sure there was no danger to me as far as if weapons were involved.

Suppression RP at 12.

Stevens had no basis to believe that Setterstrom presented a safety concern that would justify the pat-down search. Although he appeared to Stevens to be nervous and fidgety, Setterstrom made no furtive gestures and did nothing to rouse suspicion that he was dangerous. Stevens had no indication that a weapon may be present. Instead—as was the case in *Smith*—Setterstrom was searched simply because Stevens believed that Setterstrom's behavior indicated that he was high on drugs and that "[t]hese people that are involved in methamphetamine, to me, will become violent at any moment." Suppression RP at 12. This general belief does not justify the invasion of Setterstrom's constitutional rights. See *Lennon*, 94 Wn. App.

573, 580-81, 976 P.2d 121 (1999) (general suspicion that weapons may be present did not justify search where no individualized suspicion defendant was armed or presently dangerous), rev. denied, 138 Wn.2d 1014 (1999).

2. THE OFFICER UNLAWFULLY EXCEEDED THE SCOPE OF THE *TERRY* SEARCH WHEN HE REMOVED "HARD OBJECTS" FROM SETTERSTROM'S PANTS POCKET THAT HE DID NOT REASONABLY BELIEVE WAS EITHER A WEAPON OR CONTRABAND.

The search of Setterstrom by Stevens was unlawful because it exceeded the permissible scope of a *Terry* pat-down search for weapons. Therefore, the evidence recovered from Setterstrom as a result of the unlawful search and ensuing arrest should have been suppressed.

As noted *supra*, during an investigatory stop of an individual, a limited pat-down search for weapons is warranted if the investigating officer reasonably believes that the suspect is presently armed and dangerous. *Terry,* 392 U.S. at 30; *State v. Loewen*, 97 Wn.2d 562, 566, 647 P.2d 489 (1982); *State v. Blair*, 65 Wn. App. 64, 70, 827 P.2d 356 (1992); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). The officer must be confronted with specific facts and circumstances within the immediate context of the stop that would provoke a reasonable concern that the individual is armed and dangerous. *Terry*, 392 U.S. at 30; *State v. Hobart,* 94 Wn.2d 437, 441, 617 P.2d 429 (1980); *State v. Galbert*, 70 Wn. App. 721, 725, 855 P.2d 310

(1993).

If the contact that results from a standard pat-down search fails to identify an object as a weapon, further intrusive efforts, such as manipulation or removal of the object, are beyond the scope of a *Terry* search. *Hobart*, 94 Wn.2d at 439-440; *State v. Rodriguez-Torres*, 77 Wn. App. 687, 693, 893 P.2d 650 (1995).

Cases have held that seizures improperly exceed the scope of a protective weapons frisk when hard but very small items that could not reasonably be suspected of being weapons were pulled from suspects' pockets. In *State v. Fowler*, 76 Wn. App. 168, 170, 883 P.2d 338 (1994), *review denied*, 126 Wn.2d 1009 (1995), the officer removed a hard object, measuring two by three inches, along with two soft objects of indeterminate shape. *Fowler*, 76 Wn. App. at 170. The Court held that this removal exceeded the scope of a protective frisk. *Fowler*, 76 Wn. App. at 173.

In *Galbert, supra*, the removal of a "three inch by one inch lump," which turned out to be rock cocaine, was held to exceed the scope of a weapons frisk. *Galbert*, 70 Wn. App. at 726. In *Loewen, supra*, the removal of a small plastic container measuring approximately two by one-half inches, which the court characterized as being "about two-thirds the size of an average lipstick container" was held to exceed the reasonable scope of a

weapons frisk. *Loewen*, 97 Wn.2d at 567. Therefore, removal of small objects that cannot reasonably be suspected to be weapons unlawfully exceed the scope of a protective frisk for weapons.

In *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 2137, 124 L. Ed. 2d 334 (1993); the United States Supreme Court—in what it called a "plain touch" seizure—ruled that a police officer is not required to ignore the discovery of evidence while patting down a subject pursuant to *Terry*. Emphasizing that the purpose of a *Terry* pat-down is not the discovery of evidence, however, the Court placed an important restriction on the seizure; the officer must have probable cause to believe and immediately recognize the object as contraband. *Dickerson*, 124 L. Ed. 2d at 345-46; *State v. Hudson*, 124 Wn.2d 107, 114, 874 P.2d 160 (1994); *State v. Tzinzun-Jimenez*, 72 Wn. App. 852, 854, 866 P.2d 667 (1994). To satisfy the "plain feel" exception, just as with its plain view antecedent, tactile sensing must provide immediate recognition of the object the officer has come in contact with. *Dickerson*, 124 L. Ed. 2d at 346; *Hudson*, 124 Wn.2d at 119-120; *Tzinzun-Jimenez*, 72 Wn. App. at 857. This tactile recognition must result immediately from the initial pat-down contact. If recognition is even briefly delayed, or results only after further manipulation or visual examination of the object, then the scope of the *Terry* pat-down for weapons is exceeded.

Dickerson, 124 L. Ed. 2d at 348; *Hudson*, 124 Wn.2d at 118; *Tzintzun-Jimenez*, 72 Wn. App. at 857.

The facts of *Dickerson* are illustrative. The officer was conducting a *Terry* detention and pat-down when he felt a "small lump" in the suspect's pocket. Examining it with his fingers, the lump slid, causing him to believe that it was an object wrapped in cellophane. Removing the object, he determined that it was crack cocaine. The Supreme Court affirmed the suppression of the lump because the officer did not immediately recognize the object as contraband. When the officer first felt the lump in the suspect's front pocket, he did not suspect it was a weapon and at the same time, he did not have probable cause to believe it was cocaine. He determined it was cocaine only after he squeezed the lump. *Dickerson*, 113 S. Ct. at 2138. The Court, therefore, concluded that the search should have ended once the officer was certain that the lump was not a weapon. *Dickerson*, 113 S. Ct. at 2138-39.

In the present case, Stevens testified that he felt "numerous hard objects" when patting down Setterstrom's right front pants pocket. Suppression RP at 12; Trial RP at 31. By his own admission, when he felt the objects he could not tell what they were. Stevens testified that he removed the objects because he "couldn't tell what was in there, possibly a

weapon." Suppression RP at 12. The objects removed by Stevens were not identified in the record. He stated that he "removed the objects all at once." Suppression RP at 12. As he did so, he saw the Ziploc bag. Suppression RP at 12. Although the number and size of the objects are not identified in the record, it is clear that they were small enough for "a bunch" of the items to fit into Setterstrom's front pants pocket. Suppression RP at 22.

It is the distinctive size, shape and density of weapons that allows for the permissible scope of a *Terry* pat-down to be established. *Hudson*, at 113; *State v. Broadnax*, 98 Wn.2d 389, 398, 654 P.2d 96 (1982). Only when a pat-down is inconclusive as to whether an object has the size, shape and density of a weapon is an officer entitled to do more than pat-down a suspect's outer clothing. *Broadnax*, at 298. Only if an officer feels something from which its contour or mass makes its identity immediately apparent as contraband does the plain feel exception allow for seizure of the item in the context of a *Terry* pat-down. *Dickerson*, 113 S. Ct. 2137. Here, under the prosecutor's theory, the search of Setterstrom's pants where the officer felt small, "hard" objects would virtually always allow an officer to empty a suspect's pockets of all contents detected during a *Terry* pat-down, regardless of the size, shape and density detected in the initial pat-down.

Under *Dickerson* and its progeny, removing the objects to determine their identity was unlawful. Stevens did not have probable cause to believe the objects that he removed were contraband, nor did he recognize the objects that he felt in the pocket as a weapon or weapons, despite his contention that the items were "possibly" a weapon. As Stevens admitted, he "couldn't tell what was in there . . . ." Suppression RP at 12. This Court should not be swayed by Stevens' additional comment that the objects were "possibly a weapon." To give weight to this type of blanket statement would open the door to removal of any object, no matter how small or nebulous, during frisks.

In addition, the record does not support the State's contention that the removal of the Ziploc bag was accidental or inadvertent. The officer testified that he removed the items "all at once." Suppression RP at 12, 22. Therefore, even assuming that Stevens could lawfully remove the small objects from Setterstrom's pockets, the law does not permit an officer to remove all objects in a suspect's pockets, particularly items that cannot reasonably be construed as a weapon.

Moreover, if the State asserts that Stevens felt the Ziploc bag while in the process of removing the two hard objects, in order to fall within the plain feel exception, Steven's recognition of the items as drugs had to occur

immediately upon his initial contact with the objects in Setterstrom's pocket. *Dickerson*, 124 L. Ed. 2d at 346. An officer must feel an object "whose contour and mass makes its identity immediately apparent" before the plain feel exception applies in the context of a *Terry* pat-down. *Dickerson*, 124 L. Ed. 2d at 346; *Hudson*, 124 Wn.2d at 118; *Tzintzun-Jimenez*, 72 Wn. App. at 857. Steven's testimony belies such a possibility. He stated that he felt the objects in Setterstrom's pocket and that he "just moved a bunch of items out'" including the Ziploc bag. Suppression RP at 22. As such, it is simply impossible to conclude that the contour and mass of the object in Setterstrom's pants pockets made its identity as methamphetamine immediately apparent to Stevens.

B. CONCLUSION

For the foregoing reasons, and for the reasons contained in the Petition for Review, this Court should suppress the evidence obtained and reverse Michael Setterstrom's conviction.

DATED: November 29, 2007.

Respectfully submitted,

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